IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 242.

THE MICHIGAN CENTRAL RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

DANIEL B. VREELAND, ADMINISTRATOR OF THE ESTATE OF ALBERT WISEMILLER, DECEASED, DEFENDANT IN ERROR.

MOTION TO DISMISS OR AFFIRM.

Comes now the defendant in error, by his counsel appearing in that behalf, and moves the court to dismiss the writ of error herein for the reason that there can now be no actual controversy involving the real and substantial rights between the parties to the record, as since the writ of error herein was sued out all material questions raised therein have been passed upon by this court and determined adversely to the contention of the plaintiff in error; and further for the reason that by virtue of the said determination of this court said writ of error is without merit; and further for the reason that by virtue of said determination of this court the said writ of error and proceedings thereunder remain only for the purposes of delay.

And the said defendant in error, by counsel as aforesaid, also moves the court to affirm the said judgment of the United States Circuit Court for the Northern District of Ohio, Western Division, from which court said writ of error was sued out, because, although the record in the said cause may show that this court has jurisdiction in the premises, yet it is manifest that since the suing out of said writ of error, decisions and determinations of this court now clearly govern the pending case, and the question on which the jurisdiction of this court depends is now so frivolous as not to need further argument, and this case is now pending in this court for delay only.

JOHN B. DAISH,
Attorney for Daniel B. Vreeland, Administrator of the Estate of Albert Wisemiller, Deceased, Defendant in Error.

WASHINGTON, *October* 5, 1912.

WASHINGTON, *October* 5, 1912.

To Messrs. F. E. Robeson (Detroit, Mich.) and E. D. Potter (Toledo, Ohio) and Potter and Potter (Toledo, Ohio), Counsel for The Michigan Central Railroad Company, Plaintiff in Error:

Please take notice that on the 4th day of November, A. D. 1912, or as soon thereafter as counsel can be heard, a motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the court thereon.

Annexed hereto is a copy of the brief or argument in support of said motion.

JOHN B. DAISH,
Attorney for Daniel B. Vreeland, Defendant in Error, for the Purposes of this Motion.

Service of the foregoing motion to dismiss or affirm and the annexed brief or argument acknowledged this 7th day of October, 1912.

Frank E. Robson.....,

Emery D. Potter.....,

Potter & Potter.....,

Counsel for The Michigan Central Railroad Company, Plaintiff in Error.

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BRIEF FOR DEFENDANT ON THE MERITS.

The plaintiff in error has filed no brief or printed argument on the merits as required by the Rules of Court; counsel for defendant in error are therefore not advised of the points of law and fact relied upon by plaintiff in error. This brief is submitted for the convenience of the court if, notwithstanding default of the plaintiff in error in this behalf, the Court shall desire to consider the assignments of error appearing in the Record herein.

On motion of defendant in error to dismiss or affirm and briefs by both parties thereon the court ordered this case to be transferred to the summary docket; the case is therefore

pending on the merits on writ of error sued out of the Circuit Court of the United States for the Northern District of Ohio, Western Division.

Statement of the Case.

The original action was brought by Daniel B. Vreeland, administrator of the estate of Albert Wisemiller, deceased, on February 5, 1910, against the defendant below, The Michigan Central Railroad Company, to recover damages on behalf of the widow of Wisemiller, because of his death by wrongful act in a railroad collision while he was working as a locomotive engineer for the railroad company in Michigan.

Some statements in the brief of defendant in error on motion to dismiss or affirm might lead the court to think that the suit was grounded solely on what is commonly called the Federal Employers' Liability Act (35 Stat. L., 65, ch. 149, as amended, 36 Stat. L., 291, ch. 143). Plaintiff's petition (Rec., p. 2) recited facts which show that the death of the decedent arose while he was working for the defendant, engaged in interstate commerce; but it also shows that a right of action existed in favor of the plaintiff by reason of statutes of the State of Michigan, which give such right, whenever a common carrier by railroad through the negligence of any of its officers, agents or employees causes the death of an employee (Rec., p. 40).

From the record it appears that Albert Wisemiller was working on the Bay City division of The Michigan Central Railroad Company on October 5, 1909; he was operating as engineer a locomotive drawing a *regular* freight train, No. 215, in a northerly direction and had orders to bring the same to a stop at a station called Carpenter. These orders also directed a southbound *extra* freight train, No. 8101, to meet Wisemiller's train at Carpenter (Rec., p. 19). Plaintiff below called as his first witness D. C. Sutherland, division superintendent of the defendant carrier, who testified (Rec., p. 10 *et seq.*) that under the train order in question (Ex-

hibit 2, Rec., p. 19) it was the duty of Wisemiller to bring his train to a stop at the station (Carpenter), and that since Wisemiller was operating a *regular* train he had the right, under the rules of the company, to occupy the main track at the station; the southbound train, being an *extra*, it was the duty of the persons operating it to stop at the switch and pull in on the side track and thus pull by Wisemiller's train. The evidence is undisputed that instead of the southbound train taking the siding (as it should) those in charge of it did not slacken speed, but kept the main track and thus recklessly caused it to collide with Wisemiller's engine, shortly after it had come to a stop on the main track. A graphic description of the collision is given by the witness Kearsly (Rec., p. 33 *et seq.*); he says that he was a brakeman on Wisemiller's train, and when the same come to a stop Wisemiller ordered him to run ahead and open the switch for the southbound train; that he had succeeded in getting about seven car lengths north of his train when he saw the southbound train had not stopped at the switch and he attempted to swing it down; that the southbound train did not stop but collided with Wisemiller's engine. The evidence shows, and it is admitted by the answer of the defendant, that Wisemiller received in the collision injuries which resulted in his death about three hours thereafter. There is not a scintilla of evidence indicating any negligence on the part of Wisemiller.

At the conclusion of the testimony, the facts being undisputed, it was conceded by counsel for the defendant railroad company, that the only question to be submitted to the jury was the amount of damages to which plaintiff might be entitled (Rec., pp. 46, 47). Notwithstanding this admission, error was prosecuted to this court, the right thereto being based on the claim that the Federal Employers' Liability Act is unconstitutional. All questions of the constitutionality of this act have been set at rest, pending the hearing of this case, by decision of this court: Employers' Liability cases, 223 U. S., 1, decided January 15, last. In

spite of the determination of these questions adversely to the contentions of the plaintiff in error pending hearing by this court, it is now sought to have this court pass upon other and minor questions—questions which in and of themselves would not be cognizable by this court.

For convenience the Federal Employers' Liability Act is printed in the Appendix hereof.

The Assignments of Error.

The assignments of error, sixteen in number, will be found at page 54 *et seq.* of the record. These divide themselves broadly into two classes: (*a*) Those involving the constitutionality of an act of Congress entitled "An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases," approved April 22, 1908, as amended April 5, 1910—being the fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth—eleven in all; and (*b*) certain minor alleged errors, being the first, second, third, fifteenth and sixteenth. All of the assignments of error in the first class, being constitutional, have heretofore (January 15, 1912) been disposed of by this court (Employers' Liability cases, 223 U. S., 1). Those in the second class are either too broad to receive consideration, apparently being inserted out of abundant caution, as the first, third, and sixteenth (complaining in general terms because the trial judge refused to direct a verdict for the defendant), or alleging that no right of action survived (assignment two)—a question heretofore determined adversely to contention of plaintiff in error in Employers' Liability cases (223 U. S., 1), or alleged error in charging on the measure of damages (fifteenth assignment)

Outline of Argument.

The plaintiff in error having at the trial abandoned all questions of constitutionality of the statute and having continued so to do in its brief on defendant's motion to dismiss or affirm and the determination by this court pending hearing herein of all constitutional questions sought to be raised, this court has no jurisdiction on the direct appeal from the circuit court to determine questions not within the provisions of section 238 of the Judicial Code (act March 3, 1911). To secure a review of such questions error should have been prosecuted to the Circuit Court of Appeals.

Assuming, but not conceding, that this court has jurisdiction of these non-constitutional and minor questions, they are clearly without merit.

ARGUMENT.

On their face the assignments of error raise but two questions:

1. The constitutionality of the Federal Employers' Liability Act;

2. Minor questions—the interpretation of the said act, and the propriety of the charge to the jury.

I.

The constitutional questions were abandoned by the defendant below at the trial of the case, have since been abandoned in its brief on the motion to dismiss or affirm, and pending hearing of the case have been decided adversely to the contentions of the railroad company.

(a) The constitutional questions were abandoned by the railroad company at the trial.

At the close of the evidence (Rec., pp. 46, 47), which had shown that the deceased came to his death through the negligence of persons in the employ of the defendant, the following colloquy took place:

> "Mr. THATCHER: At this point, if your honor please, I am of the opinion that the plaintiff should, and he does, now make a motion to direct this jury to return a verdict for the plaintiff, and the only thing we need to argue will be the amount of damages.
>
> "The COURT: That thought was in my mind when the defense rested. Is there any controversy upon any question, as the court views the case, except the question of the amount of damages? Are not the facts all conceded? Is there any other question here?
>
> "Mr. PORTER: We think that is true, if your honor please."

Later, when counsel for the plaintiff felt it necessary to interrupt counsel for the railroad in his argument to the jury and direct attention to the character of the argument being made, the following was said (Rec., p. 47):

> "The Court: The only question in the court's mind is the question of the amount of recovery. * * * It seems to the court that the undisputed facts of this case impute liability to the company under this act. There is no evidence here that the company, independent of the acts of its subordinates, was negligent, but the company suffers through the occurrence of an act of this character, which could not possibly arise unless some one under the company was at fault. That is all there is to it. We all agree on that.
>
> "Mr. Rosson: I have no desire to depart from that, and I do not believe that I was doing that, if your honor please."

As a result of such admissions by two of the railroad's attorneys these constitutional questions could not properly, it is submitted, be thereafter raised.

(b) The brief of the railroad company on the motion to dismiss or affirm admits that pending hearing herein this court has settled the constitutionality of the Employers' Liability Act and abandons any rights (if rights it had on such grounds) under the act.

(c) Whether or not the railroad company abandoned at the trial and in this court its contentions on constitutional grounds, such contentions have heretofore been denied by the decision in Employers' Liability cases, 223 U. S., 1. *There is nothing in this case by which it can be differentiated from the cases there decided.*

It is proper to say that at the time error was sued out in this case (March 6, 1911) this court had not passed upon the amended Employers' Liability Act; there is no question

here of good faith in prosecuting error; the question in this behalf is solely on the right to have error, having abandoned the only defense for which error to this court was sought and would lie. We respectfully submit that having abandoned a defense, one cannot thereafter rely upon it.

But, admitting for the purpose of this argument, and for the purpose of the argument only, that the railroad company did not at the trial abandon its defense on the constitutional points, or, if it did, that it could thereafter rely on them, the question of the jurisdiction of this court arises. The constitutional questions being properly raised, error lies to this court under the provision of section 238 Judicial Code,—providing error "in any case in which the constitutionality of any law of the United States * * * is drawn in question." What is before the court under such circumstances is well known; but here, on the hypothesis above stated, there is not now (nor has there been since January 15, 1912) any right to writ of error on constitutional objections to the statute. The only reason by which this court could entertain jurisdiction has been dispelled. It is therefore submitted that the cause for invoking the jurisdiction of this court herein, to wit, the constitutional objections, having failed (even if not abandoned), there is removed from consideration by this court the minor questions, to wit: Interpretation of the statute and propriety of charge to the jury. Error for such last mentioned questions lies to the Circuit Court of Appeals (Judicial Code, sec. 128).

II.

Assuming that all the questions raised by the Assignments of Error are properly before and can be considered by this court, they will be found upon examination to be without merit.

The principal question (assuming that it still exists herein, in spite of the abandonment of it) has been answered heretofore by this court. The minor questions are two in

number: (1) the proper interpretation of the statute as to whether or not, if death be not instantaneous, a right of action for the benefit of the widow survives, and (2) the propriety of the charge to the jury. As before stated both of these questions are properly cognizable by the Circuit Court of Appeals; if they be here for consideration, it is submitted they were properly answered by the decisions of the learned judge below, particularly in his opinion on motion for new trial (Rec., p. 14.)

(1) The first of these minor questions concerns the interpretation of the statute. The second and third assignments of error taken together would have this court hold that, as the injured engineer lived after the accident three hours, no right of action survived. To so hold, this court is called upon to read into the statute provisions not now in it. The act (sec. 1) makes common carriers by railroad, engaged in interstate commerce,

> "Liable in damages to any person suffering injury while he is employed by such carrier in such commerce,
>
> "or, in case of death of such employee, to his or her personal representative, for the benefit," etc.

And section 9 provides—

> "that any right of action given by this act to a person suffering injury shall survive to his or her personal representative."

The effect of the statute with respect to the former rule relating to survivorship was thus stated by this court in Employers' Liability cases, 223 U. S., 1, 50:

> "The rule denying a right of action for the death of one person, caused by the wrongful act or neglect of another, is displaced by a rule vesting such a right of action in the personal representatives of the deceased, for the benefit of designated relatives."

Aside from this statement, the clearness of the language of the act is apparent, and no doubt whatever can be predicated concerning the meaning thereof.

The situation in this behalf may be befogged, however, if the decisions on other statutes having the same or similar objects, but differing in language, be said to be applicable here. As showing what, we submit, was the clear intent of Congress, it is advisable to refer briefly to the history of previous legislation.

> "The unsatisfactory state of the common law, which denied any right to recover for death due to negligence or wrongful act, led to the passage of statutes giving a right of recovery in such cases. The English act of 1846 (9 & 10 Vict. C., 93), commonly designated as 'Lord Campbell's Act,' so often referred to, has served as a model upon which most of the statutes of the various States of the Union have been enacted. Statutes of this general character do not merely remove the operation of the maxim *'Actio personalis moritur cum persona,'* but give a new cause of action. The object of all statutes passed in conformity with the general purpose of the Lord Campbell Act is to provide the means for recovering the damages caused by that which is in its nature a tort. The death of the party injured ceases to relieve the wrongdoer from liability for damages caused by the death." Peers *vs.* Nev. Power, etc., Co., 119 Fed., 401.

Unless the provisions of the particular statutes are distinctly and clearly to the contrary, it is the rule of the Federal and many State courts that so long as the death of the injured party is occasioned by acts within the statute, it is immaterial whether or not the death and injury are simultaneous.

Roach *vs.* Imperial Min. Co., 7 Fed., 698.

Roach *vs.* Cons. Imp. M. Co., 7 Sawy. (U. S.), 224, construing Nevada law.

Matz *vs.* Chicago, etc., R. Co., 85 Fed., 180, construing Missouri law.

Sternenberg *vs.* Mailhos (C. C. A.), 99 Fed., 43, construing Texas law.
St. Louis, etc., R. Co. *vs.* Dawson, 68 Ark., 1.
Murphy *vs.* N. Y., etc., R. Co., 38 Conn., 184.
Mallot *vs.* Shimer, 153 Ind., 35, construing Illinois law.
Conners *vs.* Burlington, etc., R. Co., 71 Iowa, 490.
Warden *vs.* Humeston, etc., R. Co., 72 Iowa, 201.
Brown *vs.* Buffalo, etc., R. Co., 22 N. Y., 191.
Perham *vs.* Portland Elec. Co., 33 Ore., 451.
Internat'l, etc., R. Co. *vs.* Kindred, 57 Tex., 491.
Boyden *vs.* Fetchbury, etc., R. Co., 70 Vt., 125.
Van Amberg *vs.* Vicksburg, etc., R. Co., 37 La. Ann., 651.
Hamilton *vs.* Morgan's L., etc., R. Co., 42 La. Ann., 824.
Legg *vs.* Britton, 64 Vt., 652.

Of course, where States have so-called "survival acts" and a statute creating a new cause of action (as in Michigan) it would appear to be a salutary rule that an administrator can recover damages under the latter statute only if death is instantaneous, and if the death is not instantaneous he can recover under the former statute. Sweetland *vs.* Chicago, etc., R. Co., 117 Mich., 329; Dolson *vs.* Lake Shore, etc., R. Co., 128 Mich., 444; Kyes *vs.* Valley Telephone Co., 132 Mich., 281; Oliver *vs.* Houghton Co. S. R. Co., 134 Mich., 367. Such statutes are clearly distinguishable from the one under consideration; also such statutes as exist in Maine (Sawyer *vs.* Perry, 88 Me., 42). In truth, the rule in Michigan and Maine seems to be and justifiably is (by reason of the language of the acts) at variance with the rule elsewhere.

We submit that the reasoning of Mr. Justice Brewer, construing the Kansas Civ. Code, is sound:

> "Section 422 gives a new right of action—one not existing before; an action which is founded on survivorship; an action which takes no account of the

> wrong done to the decedent, but one which gives to the widow or next of kin damages which have been sustained by reason of the wrongful taking away of the life of the decedent. It makes no difference whether the injured party was killed instantly, or lived months; whether he suffered lingering pain or not; whether or not he was put to any expense for medical attendance and nursing."
>
> Hulbert *vs.* Topeka, 34 Fed., 410.

To read into this act (and it is necessary so to do to sustain the propositions in the second and third assignments of error) the word "instantaneous" or "immediate" death would, we submit, change the plain and unambiguous words of the statute and nullify the beneficent purposes for which it was enacted by the Congress.

(2) The fifteenth assignment of error concerns the charge and alleges error in that the court instructed the jury that in assessing the pecuniary damages which the widow may have sustained that:

> "It is proper to consider the relation that was sustained by Mr. Wisemiller and Mrs. Wisemiller, namely, the relation of husband and wife, and draw upon your experience as men, and measure as far as you can, what it would have reasonably been worth to Mrs. Wisemiller in dollars and cents to have had, during their life together, had he lived, the care and advice of Mr. Wisemiller, her husband" (Rec., p. 56.)

With respect to a charge it is submitted that it is proper to consider the entire charge (Baltimore, etc., R. Co. *vs.* Mackey, 157 U. S., 72); the entire charge appears at p. 47 *et seq.* of the record. "Sentences may, it is true" said Strong, J., in Evanston *vs.* Gunn, 99 U. S., 660, "be extracted from a charge, which, if read apart from their connection, need qualification. But the qualifications were given in the context and the jury could not have been misled." And Mr. Justice Davis, in U. S. *vs.* Conklin, 1 Wall.,

644, 654, appreciated that plausible argument might be made on stray words in a charge, but unless calculated to mislead they are harmless.

> "A nice criticism of words will not be indulged where the meaning of the instruction is plain and obvious and cannot mislead them" (the jury).

It is not now contended that it would have been proper for the trial judge to have instructed the jury that in awarding damages it might have considered grief and other elements of like character. In truth, the court was very careful to exclude everything but the pecuniary loss which the widow had sustained. However, it is as yet an open question whether or not the plaintiff, in a case for death by wrongful act under the Federal statute, may not recover for the grief and other like elements of damage which the next of kin suffer in such a case. It will be noted that the Federal statute makes no reference whatever to "pecuniary" loss. The statute says that the defendant "shall be liable in damages * * * for such injury or death," thus permitting damages of whatever kind or nature sustained by him or her for whose benefit the statute was enacted. The case of Steel, Adm., *vs.* Kurtz *et al.* 28 Ohio St., 191, is not applicable here for it holds nothing more nor less than that the jury should be limited to the "pecuniary" loss which is sustained; the court, however, takes care to point out the fact that this is the rule in Ohio, because the Ohio statute limits the damages to "pecuniary" loss; the court also says that such is the prevailing rule, under like statutes, both in England and America.

Conceding, for the purpose of argument, that under the Federal Employers' Liability Act the widow can sue for pecuniary loss only, the question to be determined is what constitutes pecuniary loss. We know of no well-considered case in which the pecuniary loss is limited only to the earning capacity of the decedent. If this were the rule of law, then the widow of a man who may have retired from active

business would suffer no damages whatever by reason of his death by wrongful act. Such a ruling would do violence to the intent and purpose of Congress in enacting the statute. One of the leading cases in the Federal courts is N. Pac. R. Co. *vs.* Freeman, 83 Fed., 82. The second paragraph of the syllabus is as follows:

> "The court charged that, in fixing the damages, the jury might take into consideration deceased's ability to earn money, to support, maintain, care for and protect his wife and children, and to educate and train the latter and the loss to the wife and children because of being deprived of the use and comfort of his society, and the loss of his experience, knowledge, and judgment in managing his and their affairs, etc., Held, that this was not calculated to mislead the jury into the belief that they might give damages for a loss of society in the sentimental sense, it being clear that the court intended a loss of society in the material and pecuniary sense."

Error was prosecuted in this case to this court, where the same was reversed (174 U. S., 379), on the sole ground that the decedent was guilty of contributory negligence.

Also see Felt *vs.* Puget Sound Elec. Ry. Co., 175 Fed., 477. The second paragraph of the syllabus is as follows:

> "While loss of decedent's society, protection and guidance is an element of damage in an action for wrongful death, it is only the pecuniary, and not the sentimental, value thereof for which recovery may be had."

In the case of Bollinger *vs.* St. P. & Duluth R. R. Co., 35 Minn., 418, brought to recover for death by wrongful act, on behalf of a widow and children, the court used the following language:

> "The jury, in such cases, may consider prospective advantages of a pecuniary nature, which have been cut off by the premature death (in this case) of the husband and father. The value of the services of

the head of a family in a pecuniary sense cannot be limited to the amount of his daily wages, earned for their support. His constant daily services, attention, and care in their behalf, in the relation which he sustained to them, may be considered as well and the jury must judge of the circumstances of each case. In such cases damages for mere loss of society or mental suffering are not to be included."

Also see—

Chattanooga R., etc., Co. *vs.* Clowdis (Ga.), 17 S. E. Rep., 88.

Mo. Pac. R. Co., *vs.* Bond, 2 Tex. Civ. App., 104.

Numerous cases have held that where a father or mother has been removed by an act of negligence, leaving children. the jury may consider as an element of pecuniary loss the fact that the beneficiaries have been deprived of the care, nurture, and guidance of a parent. The following are some of the cases holding this doctrine. Tilley *vs.* P. R. R. Co., 29 New York, 252; St. Louis, etc., R. Co. *vs.* Haddry, 57 Ark., 306; Stoher *vs.* St. L., I. M. & S. Ry. Co., 91 Mo., 509; Walker *vs.* McNiell, 17 Wash., 582.

It is quite apparent that if the care and guidance and advice of the father is of pecuniary value to the children, likewise is the care and advice of the husband of value to his wife.

It is a matter of common knowledge that when a woman is left to care for herself and manage her own financial affairs, that she is frequently the victim of unscrupulous persons, who take advantage of her position. If the same woman were to have the care and advice of her husband she would not only be shielded from the liability of falling a victim to the schemes of the designing, but, in fact, would seldom be approached by those who seek to defraud. In addition, the care and advice—maintenance, management, oversight, supervision, surveillance, and watchfulness—of the husband is of value to the wife in that it enables her to

invest that which she may have to the best advantage and thereby be of financial profit.

It will be noticed that in the instruction of the court in the case at bar the jury were not told that they could give damages for the grief which the widow had suffered but could only consider "what it could have reasonably been worth to Mrs. Wisemiller in dollars and cents to have had, during their life together, had he lived, the care and advice of Mr. Wisemiller, her husband."

By referring to the charge of the court, bottom of page 47, it will be noticed that the court expressly told the jury that the damages must be limited to the pecuniary or financial loss which the widow had sustained. The court also said:

> "You will observe at the outset that you are not to take into consideration for any purpose here the fact that this lady, if that be a fact (and we may assume that it is the fact, from our common observation of life), suffered anguish and sorrow as a result of the loss of her companion. In no wise are you authorized in this case to award her damages by way of a balm to her feelings; that consideration should be dropped out of the case absolutely."

Further, it is apparent that the jury were not mislead, for they did not give Mrs. Wisemiller any more than the actual loss sustained by being deprived of the income which she was accustomed to receive from her husband during his life. Even if the charge were erroneous, which we by no means concede, it was harmless.

The undisputed evidence to which we have referred shows that the widow was accumulating an average of $600 per year and that her husband's earnings averaged about $1,650 per year. If we deduct from this amount $550 as his probable expenses, we find that the widow was receiving a benefit of approximately $1,100 per year.

The decedent's expectation of life was 24.46 years.

According to annuity tables, to secure an income of $1,100

per year, to a person aged 45 years, it is necessary to multiply that sum by 11.428, which would make $12,578.80 as the sum required to purchase the annuity named.

Thus it is clear that the jury awarding a verdict of $12,000 did not add anything above the actual amount necessary to purchase the income which the widow was then receiving.

This view was entertained by the trial judge, as appears from his opinion on the motion for new trial (Rec., pp. 14, 16) in which he says:

> "In fact, the amount of the award measures so closely to what might be said to be proper, having regard only to his earning capacity, that one might almost say that the jury had not given any consideration to that portion of the court's charge wherein they were given leave to include as a measure of damages their estimation of the value of the care and advice of the husband to the wife" (p. 16).

It is unnecessary to call attention to the numerous cases in which the courts have sustained verdicts far in excess of the amount returned in the case at bar, and in many instances where the evidence failed to show as great earning capacity as the decedent, Wisemiller.

The cases cited as authority to sustain the point that it is improper for the court to instruct the jury that they may consider the pecuniary value of the care and advice of a husband in fixing the amount of damages to be awarded to his widow do not maintain that contention.

In Sternfels vs Met. Street Ry. Co., 73 N. Y. App. Div., 494, the court held that the father owed to his children the duty of nurture and intellectual, moral and physical training, and of such instruction as can only proceed from a parent. Testimony which bore upon the care and attention which the deceased devoted to his family was held to be properly admitted.

In Railroad Co. *vs.* Wilson, 48 Fed., 57, the error committed was in allowing the jury to assess damages for the loss of society.

The case of Railroad Co. *vs.* Walker, 125 S. W., 99, was decided upon the question whether the sympathy of the jury was excited by the court in instructing them that no recovery could be had for grief and sorrow or loss of companionship.

The case of Gas Co. *vs.* Rogers, 135 S. W. 904, held that sorrow caused by the death of and the loss of companionship of a husband are not proper elements of damage.

The court in Railroad Company *vs.* Golway, 6 App. (D. C.), 144, recognized the rule as established that where minor children have lost a mother through the negligent acts of another the loss of her care, education and training are an element of pecuniary injury, and admitted the application of the same rule to cases involving the death of a father. The court held that "advice and counsel" to three grown sons, the eldest of whom was 34 years of age, while it might be of moral value, would not form a basis of pecuniary damages.

The case of Railroad Co. *vs.* Bentz, 108 Tenn., 670, throws no light on the subject since the error there found was in the action of the court in instructing the jury that it might consider not alone the "advice and counsel" but also the "comfort and enjoyment."

It is submitted that the charge of the trial court is clearly within the well recognized rule as laid down in the leading cases on the subject, which are: Tilley *vs.* R. R. Co., 29 N. Y., 252; Railroad Company *vs.* Wightman's Adm., 39 Gratt., 436; Searle *vs.* Railroad Co., 32 W. Va., 370; Howard *vs.* Legg, 93 Ind., 523; and cases above referred to.

One oft used meaning of the word "care" shows the propriety of permitting the jury to take this element into consideration.

"Charge; oversight or management, implying responsibility for safety and prosperity" (Webster's Internat. Dict., 1895).

"Responsible charge or oversight, often implying concern for safety and prosperity."

"Watchful regard and attention, with a view to safety or protection or to the result or effect; solicitous heed; watchfulness." (Standard Dictionary.)

No one can successfully deny that one who has been deprived of the oversight and management implying responsibility, which conduces to safety and prosperity, has suffered a pecuniary damage. The court in the case at bar very carefully instructed the jury that it must exclude all "damages by way of a balm" and must limit its consideration solely to the financial loss sustained (Rec., p. 48-49).

In conclusion, it is submitted that the railroad company having abandoned at the trial table its constitutional rights as a defense and having also abandoned them in its brief on Motion to Dismiss or Affirm it cannot properly revive these rights for the sole purpose of attempting to give this court jurisdiction, in order that the judgment of this court may be had on certain minor questions, for the determination of which this court has no jurisdiction.

And it is also submitted that as this case is in no wise distinguishable from Employers' Liability cases, 223 U. S., 1, the same ruling should be made herein as therein.

If, however, this court shall see fit to determine the minor questions raised by the Assignments of Error, it is submitted (*a*) that the interpretation sought by the plaintiff can only be had by reading into the statute language which would nullify the purposes of the act and (*b*) that the

charge to the jury was entirely proper for the reason (among others) that the jury were not misled or misled or prejudiced thereby.

Respectfully submitted,

JOHN R. DARBY,
Attorney for Daniel B. Vreeland, Administrator of Estate of Albert Winemiller, Deceased.

JOSEPH D. SULLIVAN,
Of Counsel.

WASHINGTON, *November 25, 1912.*

APPENDIX.

EMPLOYERS' LIABILITY ACT.

An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every common carrier by railroad, while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states and territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

SEC. 2. That every common carrier by railroad in the territories, the District of Columbia, the Panama canal zone, or other possessions of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason

of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act, to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Sec. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Sec. 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the

United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.

SEC. 7. That the term "common carrier" as used in this act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

SEC. 8. That nothing in this act shall be held to limit the duty or liability of common carriers, or to impair the rights of their employees under any other act or acts of Congress, or to affect the prosecution of any pending proceeding or right of action under the act of Congress entitled, "An Act Relating to Liability of Common Carriers in the District of Columbia and Territories, and to Common Carriers Engaged in Commerce between the States and Foreign Nations to their Employees," approved June eleventh, nineteen hundred and six.

SEC. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee; but in such cases there shall be only one recovery for the same injury.

(35 Stat. at L., 65, chap. 149; U. S. Comp. Stat. Supp., 1909, p. 1171; 36 Stat. at L., 291, chap. 143.)